IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

PC CIVIL APPEAL NO.27 OF 2021

(Arising from the District Court of Liwale at Liwale in Matrimonial Appeal No.5 of 2021 and originating from Liwale Urban Primary Court in Matrimonial Cause No.31 of 2021)

HALIMA MOHAMED JIKA..... APPELLANT

VERSUS

SAID HUSSEIN KIGOGO.....RESPONDENT

JUDGEMENT

26/7/2022 & 6/12/2022

LALTAIKA, J:

This appeal originates from the Liwale Urban Primary Court at Liwale in Matrimonial Cause No.31 of 2021. In that case, the appellant herein, **HALIMA MOHAMED JIKA** petitioned for a decree of divorce, division of matrimonial assets and maintenance of the children against the respondent, **SAID HUSSEIN KIGOGO** after the Likongowele Ward Tribunal had failed to reconcile them.

The brief background of the matter is as follows: The parties had lived together as husband and wife for about twenty-one (21) years. They are blessed with three issues. In 2016 their marriage experienced some hardships of confrontations between them. Again, on 28/4/2021 the respondent divorced the appellant by issuance of Islamic "talaq"

witnessed by three witnesses. However, after some days the respondent revoked his talak and wanted the appellant to go back home. It seems that during the reconciliation process the respondent asked the appellant to go back home but the appellant refused. The respondent took a further step by sending other people who persuaded the appellant to accept his new proposal. Again, the appellant maintained her decision thus, the Reconciliation Board issued a valid Certificate of failure to reconcile the parties (FORM NO. 3). To that end, the appellant decided the file her Petition for divorce before the trial court and claimed three reliefs as I have mentioned them herein above.

In the course of their happily and peaceful matrimonial union and life, the parties had managed to jointly acquire several matrimonial assets. The trial court, having been convinced that the marriage of the parties was not broken down irreparably thus, it did not issue a decree of divorce under section 110(1)(a) of the Law of Marriage Act [Cap. 29 R.E. 2019]. However, it refrained in ordering the division of matrimonial assets between the parties and the maintenance of the children as prayed by the appellant.

Dissatisfied, the appellant appealed to the District Court of Liwale where she presented three grounds of appeal. After the first appellate court had heard the parties, it dismissed the appeal in its entirety. Dissatisfied once again, the appellant has lodged his appeal to this court by way of a Petition of Appeal comprised of three (3) grounds of appeal which I take liberty to paraphrase as follows: -

1. *That, the appellate court erred in law and facts by its failure to construe provisions 9(1) and 16(1) of the Law of Marriage Act [Cap.29 R.E. 2019] in which it states that, marriage means the voluntary union of a man and a woman, intended to last for their joint lives. And it demands*

consent, freely and voluntarily. If the marriage contracted without these potential ingredients there was no marriage at all as the law requires. So the word voluntary it refers acting of one's own free will but the appellant was not obtained her consent of free will in which and solely based on respondent side in determining the appeal.

2. *That, the appellate court erred in law and facts by failure to make critical analysis and understand the meaning of intended verse coated on its judgment The Holy Qur'an Surat Baqala (2:228) as translated by Abdullah Yusuf Ali, the essence of the verse is to provide lope hole to the parties and chances to think and regaining their marriage previously broken freely by altering words for his wife signifying a return to a broken marriage.*
3. *That, the appellate court erred in law and facts by failure to know that institution of marriage is all about loveness, without it the marriage turns bitter/sour/chungu, for that case the marriage was broken down automatically and there was not necessarily to use muscles to build marriage in which was broken automatically.*
   That is why under Section 140 of the Law of Marriage [Cap 29 R.E. 2019] states that, no proceeding may be brought to compel a wife to live with her husband or a husband with his wife, but it shall be competent for a spouse who has been deserted to refer the matter to a Board. So, it is requirement of the law to respect the dignity of the human being, to compel is the same as to disrespect dignity of human being.

At the hearing of this appeal both parties appeared in person and unrepresented. The parties to this matter submitted extensively but I will try to be brief. The appellant submitted that they have lived together for twenty years. She went further and argued that they celebrated an Islamic marriage though they did not get any certificate since during those days they were not there. The appellant contended that in 2016 troubles started. The appellant insisted that whenever they went for sesame (ufuta) farming, the respondent would sell the produce and take all the money because it was deposited in his account. The appellant stressed that the respondent would be called by his parents and send them money which he had no problem. She further submitted that the when her parents asked for help the respondent said that he cannot take care a

family that has nothing to do with him. The appellant submitted that he felt depressed and was told by the respondent to look for money through working if she wanted to help her parents. The appellant went on and contended that she decided to apply for a job at the AMCOS. She further submitted that the respondent did not want her to be employed that is why he divorced her.

Moreover, the appellant contended that she took the talak to the Baraza la Kata and the respondent affirmed that was the one who issued it. However, the appellant submitted that the Baraza la kata said it was wrong for the respondent to issue talak to her parents. The appellant argued that he was aggrieved with the decision of the first appellate court that she do not qualify for a divorce. The appellant contended that she was told to go back to her husband, but she refused since marriage is a contract. Furthermore, the appellant submitted that she went back to her parents where she stays with her two children (Faidha and Salma) while the respondent is staying with Johari. The appellant submitted that she was told that she could not be given any property and if pressed hard she would be killed by any means. To this end, the appellant prayed for a decree of divorce and division of the matrimonial assets jointly acquired.

In response, the respondent submitted that he has lived with the appellant since 2000 and they had never been to any reconciliatory meeting be it at Balozi or Chair of the Mtaa for these years. The respondent contended that he considers the appellant as his house wife "tunda la nyumbani". The respondent submitted that he acquired all the property through his work as a kuli. The respondent contended that he gave her much freedom which made her annoying him. The respondent stressed the appellant took a form and became a member of the Likongole

AMCOS without telling him. When the respondent tried to ask her, the appellant replied him harshly and thus lost a temper and wrote "talak ya mauzi". The respondent contended that he still loves the appellant and according to Islamic tradition one has 90 days to reconsider the decision. He went and argued that within 40 days he reconsidered his decision and went before the sheikhs who told him that the appellant is still his wife. The respondent submitted on the well fair of his children who are in trouble since her daughter has failed her form two exams because she decided to stay home in order to take care Salma, his last born child. The respondent argued that he cannot kill her wife with whom she got married religiously and decided to use the tradition to recount what he wrote.

In rejoinder, the appellant contended that the respondent was told that it was not possible to use both BAKWATA and Baraza at once. Furthermore, the appellant stressed that the respondent did not follow the religious procedure. The appellant argued that the respondent went at her parents' home with one sheikh and his friend and it is not true that he came the respondent came back to him before 90 days. More so, the appellant posed a question if religion has a mandate to force a person to go back to her husband. To this end, the appellant contended that is tired and cannot go back to the respondent who seems to be gentleman, but he is not.

At the outset, in the matter at hand there are concurrent decisions of the lower courts. I am alive of the settled principle of law that the second appellate courts should be reluctant to interfere with concurrent findings of the two courts below except in cases where it is obvious that the findings are based on misdirection or misapprehension of evidence or violation of some principle of law or procedure, or have occasioned a

miscarriage of justice. See, **Helmina Nyoni vs Yeremia Magoti**, Civil Appeal No.61 of 2020, CAT at Bukoba; **Amratlal Damodar Maltaser and Another t/a Zanzibar Silk Stores v. A.H. Jariwala t/a Zanzibar Hotel** [1980] TLR 31 and **Neli Manase Foya v. Damian Mlinga** [2005] T.L.R 167. In **Neli Manase Foya v. Damian Mlinga**(supra) at page 172, the Court of Appeal had the following to say:

> *"It has often been stated that a second appellate court should be reluctant to interfere with a finding of fact by a trial court, more so where a first appellate court has concurred with such a finding of fact. The District Court, which was the first appellate court, concurred with the findings of fact by the Primary Court. So did the High Court itself, which considered and evaluated the evidence before it and was satisfied that there was evidence upon which both the lower courts could make concurrent findings of fact."*

Basing on the above foundation, this court is the second appellate court which as far as the facts of this case and the nature of the matrimonial controverse are concern, I think it is important for this court to interfere with what the lower courts have decided. The interference will enable this court to observe if the lower courts observed all provisions of the law of Marriage regarding the forum which the parties pursued before filing the Petition for divorce. Furthermore, if the lower courts paid attention to the circumstances facing the parties. Moreso, if the lower courts observed the rights of the spouses on the major condition that marriage is a voluntary union between a man and woman. Forcing the parties to live together is a violation of the Law of Marriage Act and other basic rights of a human being.

In addition, the evidence of both parties to this matter shows that they are Muslims, celebrated the Islamic marriage and they involved BAKWATA leaders in the settlement of their matrimonial dispute. After my keen perusal of the lower court files, I have noted that nowhere the lower courts satisfied themselves that the parties were married under Islamic form since the parties did not bring their marriage certificate or BAKWATA leader who would prove the existence of such marriage or reconciling the parties. Furthermore, if it is true that the parties have Islamic marriage, why did they go for reconciliation on the normal reconciliation body and not BAKWATA. Regarding all these shortcomings, I am of the settled position that failure by the lower courts to observe those issues makes the proceedings of the lower court to be tainted with illegalities.

Indeed, circumstances of the case at hand invites an order of a retrial which is guided by the land mark case of **Fatehali Manji versus Republic** (1966) EA 344 which was cited with approval by the Court of Appeal of Tanzania in the case of **William Stephen Vs Leah Julius**, Civil Appeal No.65 of 2013, CAT at Arusha (Unreported) where the Court stated:

> *"In general, a retrial may be ordered only when the original trial was illegal or defective.... each case must depend on its own facts and an order for retrial should only be made where the interests of justice require..."*

Basing on the above observation and settled principle of law, I nullify and set aside all the proceedings, judgments and orders of the lower courts regarding the marriage of the parties. Following all those anomalies on the records of the lower courts, I am inclined to order a retrial of the matter before another competent magistrate who shall abide to the law

and the circumstances facing the parties. In addition, the new appointed Magistrate need to be acquainted with the knowledge that marriage is a voluntary union and the court is not there to force the spouses to live together while there is a resistance from one party. See, **R v. R** [2004] T.L.R. at page 126. The retrial shall be with immediate dispatch and parties are directed to go at the trial court for further actions. There is no order as to costs since this is a matrimonial matter.

It is so ordered.

E.I. LALTAIKA

JUDGE

6.12.2022

Court: This Judgment is delivered under my hand and the seal of this Court on this 6th day of December,2022 in the presence of both parties who have appeared unrepresented.

E.I. LALTAIKA

JUDGE

6.12.2022

Court: The right of Appeal to the Court of Appeal is fully explained.

E.I. LALTAIKA

JUDGE

6.12.2022